IN THE

# Supreme Court of the United States

DEC 10 1951
CHARLES ELMORE CRO
CL

OCTOBER TERM, 1951.
No. 475

CONFERENCE OF STUDIO UNION, an unincorporated association, *et al.*,

*Petitioners,*

*vs.*

LOEW'S INCORPORATED, a corporation, *et al.*,

*Respondents.*

## PETITION FOR WRIT OF CERTIORARI.

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IN THE

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OCTOBER TERM, 1951.

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*Petitioners,*

*vs.*

LOEW'S INCORPORATED, a corporation, *et al.*,

*Respondents.*

## PETITION FOR WRIT OF CERTIORARI.

*To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:*

Petitioners (appellants and plaintiffs and intervenors), pray that a Writ of Certiorari issue to review the judgment of the Court of Appeals for the Ninth Circuit affirming a judgment of the District Court for the Southern District of California.

The judgment of the District Court was entered after granting a motion of the defendants for judgment on the pleadings made prior to trial. The action was one for damages and for an injunction under the United States anti-trust laws, based upon an Allen Bradley type of con-

spiracy* on the part of the major motion picture producers and a group of unions, directed against smaller, independent motion picture producers, and plaintiff labor organizations.

## Jurisdiction.

The judgment of the Court of Appeals was entered on November 2, 1951. At this writing the opinion has not yet been officially reported.

Jurisdiction of this Court is invoked under 28 U. S. C. A., Section 1254(1) and 2101(c).

## Statement of the Matter Involved.**

In 1946 several thousands of employees in the motion picture industry were discharged and denied opportunity for re-employment, and a group of labor organizations was destroyed as part of a plan between the labor defendants (here called IATSE) and the motion picture producer defendants (here called Majors) [R. 29-30, 32-33] to eliminate a group of smaller motion picture producers from competition. [R. 28-29, Complaint Par. XII.] These consequences were not incidental or remote, but were specifically planned by the conspiring defendants as a necessary means to accomplish their ends. [R. 29,

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*A combination to violate the anti-trust laws, whose participants include labor and non-labor elements. (*Allen Bradley Co. v. Local Union No. 3,* 325 U. S. 797.)

**As the case was decided on the pleadings alone, without evidence, references are to *allegations* of the Complaint.

Complaint Par. XII(e); R. 31-33, Complaint Par. XIII, and particularly XIII(e), (f), (g) and (h).]

The circumstances necessary to understand these events may be stated briefly.

Majors are the ten largest producers of motion pictures [R. 11-15.] Included with them as defendants were several wholly owned and affiliated distributing companies. [R. 15.] For the purpose of carrying out the conspiracy, the activities of Majors were coordinated through a single corporation, Motion Picture Association of America, Inc. [R. 19-20.] Majors are engaged in interstate commerce among the several states in the manufacture of film [R. 21-24]; distribution is carried on among the several states and with foreign countries. [R. 27.]

A group of smaller producing companies (here called the Independents) likewise in interstate commerce, compete with the Majors. [R. 27.] The Independents produce fewer and less costly films; they employ about one-fifth of the number of persons employed by the Majors; their financial resources are not comparable to those of the Majors. [R. 28.]

Defendant IATSE controls a number of crafts which are indispensable for the production of motion pictures. [R. 30, Complaint Par. XII(i).] Plaintiff labor organizations represented other crafts which also work in the motion picture industry. [R. 8-10.] (Except where the distinction is necessary to sense, plaintiffs and intervenors are here called Conference.)

The essential plan of this conspiracy was this: by discriminatory rates favoring Majors and by furnishing its most skilled labor to Majors, IATSE would drive the Independents from the producing field and eliminate them as competitors. [R. 28-31.] As an inducement to IATSE, and as part of the same conspiracy, Majors would discharge employees affiliated with Conference and would refuse to re-employ them except under yellow-dog conditions. [R. 29, 30, especially Complaint Par. XII(e).] To meet the anticipated shortage of product and to prevent unequal advantage among the Majors, they agreed to hoard completed films, to curtail distribution, to stretch playing time in controlled houses, to force longer runs in independent houses, and to re-release old films. [R. 30, Complaint Par. XII(g); R. 32, Complaint Par. XIII(a), (b), (c) and (d).] No independent action was to be taken by any of the defendants until the plan had been carried out. [R. 31.] At the time the suit was commenced the conspiracy was largely consummated. [R. 31-36.]

The Complaint asked for a recovery of losses sustained by the labor organizations and by an individual suing in a representative capacity for himself and all others who had been discharged; the Complaint also asked for an injunction to restrain the continuation of the conspiracy. [R. 38-39.] Several hundred employees who had been discharged by Majors as part of the conspiracy were allowed to intervene, and in effect joined in the Complaint. [R. 71, 74-83, 89-93.] Motions to dismiss were denied

[R. 40, 97, 98, 99]; and answers were filed by all appearing defendants. [R. 44, 100, 103, 109 and 112.] However before trial the District Court granted motions for judgment on the pleadings. [R. 142.] (Its order is printed in the Appendix.)

The Court of Appeals affirmed on a ground rejected by the District Court.

## Questions Presented.

1. A conspiracy to restrain trade in violation of the United States anti-trust laws succeeds in carrying out its plan, a portion of which grievously injures plaintiffs but would not, standing alone, directly restrain trade; may the plaintiff have relief in the United States courts?

2. A group of manufacturers and distributors in interstate commerce seeking to eliminate competitors engage the assistance of a group of labor unions, and as *quid pro quo* for that assistance promise to and do destroy other labor unions (plaintiffs) and deprive hundreds of employees (plaintiffs and intervenors) of work and job opportunity: are the losses caused to plaintiffs and intervenors compensable under Title 15 U. S. C. A., Section 15?

3. Is only that loss recoverable under the United States anti-trust laws which is directly caused by restraint of trade, or may there be recovery for injuries to business or property by reason of *anything forbidden* by the anti-trust laws?

4. Is the general rule of tort which permits recovery for all damages expressly undertaken and directly caused by an unlawful conspiracy applicable to conspiracies in restraint of trade, or is recovery limited to those injuries which flow from the successful consummation of a conspiracy in restraint of trade?

5. If conduct injurious to a third person is promised and performed as an inducement to another to assist in restraining trade, is not the injurious conduct in the chain of causation which tends to bring about the restraint of trade?

**Reasons Relied on for the Allowance of the Writ.**

The petitioners believe the applicable principles of decision have been settled, but no decision has been found on precisely similar or closely analogous facts. For this reason the reasons relied on for the allowance of the writ must be deemed stated in the alternative.

1. The decision of the Court of Appeals is in conflict with the decisions of other Courts of Appeal on the same matter.

2. The decision of the Court of Appeals has decided an important question of federal law, which has not been, but should be, settled by this Court.

## ARGUMENT.

### The Conspiracy Violated the Anti-Trust Laws; Any Injury Deliberately Planned and Carried Out as Part of the Necessary Means of the Conspirators Is Compensable Under the Anti-Trust Laws.

Pertinent language from the controlling statutes is:

> "Every contract, combination . . ., or conspiracy, in restraint of trade of commerce among the several states, . . . is declared to be illegal. . . ." (15 U. S. C. A. 1.)
>
> "Any person who shall be injured in his business or property *by reason of anything forbidden* in the anti-trust laws may sue therefor . . . and shall recover. . . ." (15 U. S. C. A. 15.)*

An analysis of the facts alleged shows a group of traditionally opposed elements—labor and non-labor—combining for the purpose of furthering their own and each others' interests. Majors wanted to eliminate competition by Independents. IATSE wanted to eliminate competition by Conference. For reasons immaterial to decision, each group undertook to do the other's job. Defendant IATSE undertook to eliminate Independents, and in return got the promise of Majors to destroy Conference. The agency which the conspiracy employed to inflict the injuries on plaintiffs were the employers. But the consideration for that conduct was the promise of IATSE to eliminate the Independents. The combination was cemented into unity not only by these reciprocal undertakings but also by the agreement to refrain from economic competition among themselves during the anticipated upheaval [R. 30] and particularly by the agreement

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*These sections of the statutes are quoted in full in the appendix.

on the part of all defendants to refrain from independent actions until the purposes of the conspiracy had been effected.

It is impossible in fact and erroneous in theory to try to isolate a single thread from this pattern. It was the *conspiracy* which caused the injuries here complained of.

The opinion of the Court of Appeals does not say otherwise. Furthermore that opinion proceeds on the assumption that the conspiracy violated the anti-trust laws; but says: "The appellants' connection with the alleged *illegal** conspiracy is not such as would bring them within the contemplation of the anti-trust law." These two premises, to wit, a combination forbidden by the anti-trust laws, and resulting injury to the business and property of plaintiffs should entitle them to relief. (15 U. S. C. A. 15.) But the Court of Appeals affirmed the dismissal on a theory which, it is submitted, is a departure from the law. Given a conspiracy which violates the anti-trust laws, the Court of Appeals creates classes among the consequences of the conspiracy and holds that some consequences are compensable, others are not. The Court says: "The damage alleged to have been suffered by appellants does not flow from any injury to the competitive situation of the motion picture industry, . . ."

This reasoning brings about the following result: a conspiracy, held to violate the laws of the United States, admittedly causes great economic loss; yet plaintiffs are turned out of the United States courts.

It is the purpose of the following portions of this argument to show, briefly, that the Court's reasoning is erroneous, and that its conclusion ought not to be permitted to stand.

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*Emphasis supplied.

**The Conspiracy Violated the Anti-Trust Laws.**

The use of group power to destroy a competitor who is equipped to compete violates the anti-trust laws. (*William Goldman Theatres v. Loew's, Inc.*, 150 F. 2d 738; *Quemos Theatre Co. v. Warner Bros. Pictures*, 35 Fed. Supp. 949; *McIntire v. Wm. Penn Broadcasting Co.*, 151 F. 2d 597, cert. den. 327 U. S. 779.) Horizontal agreements to curtail production and to stifle distribution are unlawful. (*United States v. Crescent Amusement Co.*, 323 U. S. 173; *United States v. Eastman Kodak*, 226 Fed. 62, appeal dismissed 255 U. S. 578; *Hartford Empire v. U. S.*, 323 U. S. 386.)

Either an unlawful purpose or an agreement to make use of unlawful means makes the whole conspiracy unlawful. (*Lynch v. Magnovox Co.*, 94 F. 2d 983; *National Fire Proofing Co. v. Mason Builders Association*, 169 Fed. 259; *McCann v. New York Stock Exchange*, 107 F. 2d 908, 912; *Pettibone v. United States*, 148 U. S. 197; *Duplex Printing Press Co. v. Deering*, 254 U. S. 443.)

The conspiracy in the present case had an undebatably criminal purpose: the destruction of the Independents as competitors. It also included unlawful means: agreements to hoard and to stretch products.

A course of conduct, otherwise lawful, is rendered unlawful if it is part of a conspiracy to violate the anti-trust laws. (*Swift v. United States*, 196 U. S. 375; *Standard Oil v. United States*, 283 U. S. 163; *United States v. New York A & P Co.*, 137 F. 2d 459, cert. den. 320 U. S. 783; *United States v. Patten*, 226 U. S. 525, 544.)

A single conspiracy may have several objects (*O'Brien v. United States*, 51 F. 2d 674, 676). In fact a single conspiracy may contemplate several offenses (*Mariano v. United States*, 91 F. 2d 691) without being severable (*Skelly v. United States*, 76 F. 2d 483, 488).

Thus the language of the Complaint [R. 28-29] as well as the authorities, show that in the case at bar there was a single conspiracy having as one of its purposes the violation of the anti-trust laws, and was accordingly unlawful.

**Plaintiffs and Intervenors Were Injured as a Direct Result of the Conspiracy.**

The injury to plaintiffs and intervenors is alleged to have been caused directly by the conspiracy. [R. 36.]

The opinion of the Court of Appeals cites decisions holding that secondary and more remote consequences of a conspiracy in restraint of trade are not compensable. (*E. g., Loeb v. Eastman Kodak Co.*, 183 Fed. 704; *Westmoreland Asbestos Co. v. Johns-Manville Corp.*, 30 Fed. Supp. 389.) But the injuries inflicted on plaintiffs and intervenors were not a remote or incidental result of the conspiracy. The discharges were deliberately planned as part of the combination [R. 29-30] and the injuries were caused "pursuant to said combination." [R. 31.]

To hold that the injuries to plaintiffs were incidental or remote is not to draw a legal conclusion from the pleaded facts, but, it is submitted, constitutes altering the allegations. On a motion for judgment on the pleadings the facts pleaded must be taken as true. (*Art Metal Construction Co. v. Lehigh Structural Steel Co.*, 116 F.

2d 57; *Friedman v. Washburn Co.*, 145 F. 2d 715; *Ulen Contr. Corp. v. Tri-County Elec. Cooperative*, 1 F. R. D. 284.)

If analysis were permissible or proper, which petitioners deny, it would show that the discharges were parallel in time if not anterior to the injuries to the Independents and therefore could not be remote or secondary consequences of those injuries; if the injuries to Conference and the injuries to Independents be deemed part of a single causal chain, it would appear that the injuries to plaintiffs might be found to be prior in time and within the class of events which would qualify as causing the injuries to Independents. However petitioners urge that such an analysis is improper. The assumption that it is possible or legally permissible to separate the injuries to the Independents from the injuries to plaintiffs should be rejected. Both were consequences of a single conspiracy which was unlawful. The question of whether one consequence caused the other is rendered irrelevant by the fact that both were caused by a conspiracy in violation of the anti-trust laws.

**The Statutes Are Mandatory and Give Redress for Injuries Caused by "Anything Forbidden" by the Anti-Trust Laws.**

Much of what has been here said up to this point is not in conflict with the decision of the Court of Appeals. Petitioners and that Court apparently agree that the conspiracy violated the anti-trust laws and that plaintiffs were injured as a result of the conspiracy.

The point at which, it is submitted, the Court of Appeals departs from accepted legal principles, is in holding

that only some kinds of injuries to business or property may be compensated. The Court says:

> ". . . in order to state a cause of action under the anti-trust laws a plaintiff must show more than that one purpose of the conspiracy was a restraint of trade and that an act has been committed which harms him. He must show that he is within that area of the economy which is endangered by a breakdown of competitive conditions in a particular industry. Otherwise he is not injured 'by reason' of anything forbidden in the anti-trust laws."

We submit that this is not and should not be the applicable rule.

The law provides for compensation for injuries to business or property "by reason of *anything* forbidden in the anti-trust laws." No broader word than the italicized term can be imagined. Nor is it necessary. The heart of the Sherman Act declares that "Every contract, combination, or conspiracy in restraint of trade" is illegal.

These two sections say that one who is injured by a conspiracy in restraint of trade *shall recover* The statute draws no distinction concerning the character of the conduct done to carry out the conspiracy, nor does it contemplate that some unlawful and destructive conduct may be carried out with impunity. It is submitted that it would be unwise, as well as contrary to the plain meaning of the statute, to tolerate some kinds of injuries flowing directly from a planned violation of the federal law.

Further it is clear that the discharges and the injuries to the plaintiffs, since they were the consideration for the conduct by IATSE did tend to create a restraint on commercial competition.

**The Decision of the Court of Appeals Conflicts With Settled Principles of Law.**

Other courts of appeal have held that damages may be awarded for loss of employment resulting from an anti-trust conspiracy. (*Roseland v. Phister,* 125 F, 2d 417; *Vines v. General Outdoor Advertising,* 171 F. 2d 487; *Gardella v. Chandler,* 172 F. 2d 402.) The Supreme Court has granted an injunction in an analogous case (*Anderson v. Ship Owners, 272* U. S. 359).

In other Sherman Act cases injunctions have been granted to restrain conduct which was otherwise lawful but was rendered unlawful only because it was part of an unlawful conspiracy. (*Allen Bradley v. Local Union No. 3,* 325 U. S. 797; *cf.* decree on retrial, 164 F. 2d 71; *Lynch v. Magnavox,* 94 F. 2d 983.)

The Court of Appeals in the instant case takes no cognizance of the fact that participants in a conspiracy in restraint of trade have set a tort in motion (*Williamson v. Columbia Gas Corporation,* 110 F. 2d 15, 18; *Imperial Film Exchange v. General Film Co.,* 244 Fed. 985; *Farmers Co-op v. Socony Vacuum Oil,* 43 Fed. Supp. 735), and under established principles the wrong-doers are liable for all damage directly caused by their tort.

Anti-trust decisions have used language indicating that "It is the *source* of the injury, and not the character of the property injured, which constitutes the test of recovery." (*Dowd v. United Mine Workers,* 235 Fed. 1, cert. den. 242 U. S. 653.) In *Westmoreland Asbestos Co. v. Johns-Manville Corp.,* 39 Fed. Supp. 117, it was

said, "Nevertheless, the gist of an action under the anti-trust laws is the injury sustained by a plaintiff as a result of a conspiracy denounced by the statutes. The moment that a violation of these laws inflicts damage upon a person, he is possessed of a cause of action to redress the wrong he has suffered."

**Conclusion.**

In witholding "the windfall of treble damages," the Court of Appeals for the Ninth Circuit records a decision which turns the plaintiffs out of court and denies *all* relief, notwithstanding the defendants have violated the laws of the United States and in so doing have inflicted the hurt. Such a decision, it is submitted, could be justified only by an inescapable statute. The wrong-doing is clear; the statute which condemns the conduct provides punishment up to a year's imprisonment; the injuries are substantial. The statutory provision for recovery of damages uses mandatory language. The distinction made by the Court of Appeals appears to be against the language Congress selected to prevent any escape. Yet the decision says that the United States courts afford no remedy.

Lest the gravity of the injury done by the conspiracy be lost in a discussion of the legal principles abstracted from the facts, it should be added that the economic tragedy which is the basis of the Complaint struck thousands of wage earners; that persons trained in the specialized skills of the motion picture industry and grown to their work over decades were abruptly thrown out; that

many are still unable to get employment in the only work they know and can only look forward to what has so far been denied them, their day in Court.

The petition for certiorari should be granted.

Respectfully submitted,

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## APPENDIX "A."

(Title of District Court and Cause)

ORDER ON MOTIONS OF DEFENDANTS FOR JUDGMENT ON THE PLEADINGS.

This cause having heretofore come before the court for hearing on the motions of the defendants, filed May 4, 1950, and May 5, 1950, for judgment on the pleadings or, in the alternative, for a summary judgment; and the motions having been argued and submitted for decision; and it appearing to the court that the complaints of plaintiffs and interveners, as amended, assert claims for damage suffered by reason of loss of employment resulting from an alleged conspiracy in violation of the anti-trust laws, and the Court of Appeals for this Circuit has held that such claims do not arise from injury to "business or property" within the meaning of Sec. 4 of the Clayton Act, 15 U. S. C. Sec. 15 (See Schatte v. International Alliance, 182 F. 2d 158, 167 (9th Cir. 1950), 183 F. 2d 685 (9th Cir. 1950), cert. [164] denied U. S. Sup. Ct., Oct. 9, 1950, rehearing denied, Nov. 13, 1950);

It Is Now Ordered that the motions of defendants for judgment on the pleadings under Rule 12(c) of the Federal Rules of Civil Procedure be and are hereby granted.

It Is Further Ordered that attorneys for defendants prepare and submit form of judgment pursuant to local rule 7 within five days.

It Is Further Ordered that the order heretofore entered setting this case for trial at 10 a.m. on December 12, 1950, be and is hereby vacated.

It Is Further Ordered that the Clerk this day serve this order by United States mail on the attorneys for the parties appearing in this action.

November 21, 1950.

/s/ WM. C. MATHES,
United States District Judge.

(Endorsed): Filed November 22, 1950. [165]

## APPENDIX "B."

15 U. S. C. A., Section 1:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: Provided, That nothing contained in sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: Provided, further, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract

or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. July 2, 1890, c. 647, Sec. 1, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 60 Stat. 693."

## APPENDIX "C."

15 U. S. C. A., Section 15:

"Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. Oct. 15, 1914, c. 323, sec. 4, 38 Stat. 731."

[illegible]

October Term, 1952

No. 475

Consolidated Steel Workers of [illegible], et al.,

*Petitioners,*

vs.

Loew's Incorporated, et al.,

*Respondents.*

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Brief in Opposition to Petition for Writ of Certiorari

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IN THE

# Supreme Court of the United States

October Term, 1951

No. 475.

CONFERENCE OF STUDIO UNIONS, an Unincorporated Association, *et al.*,

*Petitioners,*

*vs.*

LOEW'S, INCORPORATED, a Corporation, *et al.*,

*Respondents.*

**Brief in Opposition to Petition for Writ of Certiorari on Behalf of Respondents Loew's, Incorporated, Twentieth Century-Fox Film Corporation, Paramount Pictures, Inc., Columbia Pictures Corporation, R.K.O. Radio Pictures, Inc., Warner Bros. Pictures, Inc, Republic Productions, Inc., Samuel Goldwyn Productions, Inc, Hal E. Roach Studios, Inc., Universal Pictures Company, Inc., Warner Bros. Pictures Distributing Corp., Motion Picture Association of America, Inc., and the Respondent Officers and Employees of Said Companies.**

## The Opinions Below.

The Order of the District Court [R. 142-143], which states the basis of decision in that Court, was not officially reported. At the time of this writing, the opinion of the Court of Appeals [R. 162-170] has not been officially reported.

## Jurisdiction.

The petition correctly sets forth the jurisdictional requisites. (Pet. 2.)

## Questions Presented.

Does a plaintiff in a treble-damage action under the anti-trust laws state a claim for relief when the asserted injuries arise from acts which do not restrain commercial competition nor tend to produce that result?

Subsidiary questions presented are whether the Court of Appeals decision is supported on the additional grounds that: (a) The National Labor Relations Board has exclusive jurisdiction to prescribe the remedy for unfair labor practices, which precludes the federal courts from granting relief under the Sherman Act in this case, and (b) Congress did not intend in the anti-trust laws to cover restraints upon employment.

## Statutes Involved.

The statutes involved here are Sections 1 and 15 of Title 15, U. S. C. A., the pertinent provisions of which are set forth in the petition. (Pet. 19-21.)

## Additional Statement of Facts.

This case grows out of inter-union jurisdictional strife between two rival and powerful federations of studio labor unions, namely the Conference of Studio Unions (herein referred to as the CSU) and The International Alliance of Theatrical & Stage Employees and Moving

Picture Machine Operators of the United States and Canada (herein referred to as the IATSE).

The allegations of the complaint, which were adopted by intervenors, are that in June, 1946 the employers agreed with the IATSE that they "would cease to employ any person who was on said date a member of any of the following [CSU] unions * * *" and "that they would not engage any such person unless he had either given up his membership in said union or had obtained a work permit card from a local of the IATSE"; that to perform the work theretofore performed by members of the CSU unions, the employers "would thereafter employ only members of locals of the IATSE or persons who procured the written consent of a local of the IATSE" [R. 29-30, 73, 87-88]; that members of CSU unions subsequent to said date were discharged and have since been unable to secure employment in their customary work [R. 36, 72, 87-88] and others were refused employment until their union withdrew from the CSU [R. 32, 73-74, 87-88]; and that by reason of such action the plaintiff unions and their members have suffered damages. [R. 36-37, 74, 83, 88-89, 93.]

It is further alleged that the aforesaid closed shop agreement between the employers and the IATSE was part of a plan to eliminate the competition of other motion picture companies called "Independents" and thus to restrain interstate commerce in motion pictures; that the employers and the IATSE agreed that the IATSE would "furnish its most skilled members to render services only

to defendant Majors" and would "refrain from furnishing skilled members to any of the Independents unless and until all of the Majors were suppied with sufficient employees" [R. 29, 30, 73, 87]; that the IATSE would require the Independents to pay more for labor than was required of the employers [R. 30-31, 73, 87]; that the employers would curtail the production of motion pictures, would refrain from releasing pictures "for as long a period as possible," and would endeavor to persuade exhibitors to exhibit re-issues of old pictures and to run all pictures for longer periods of time than previously had been the practice [R. 29, 73, 87]; that pursuant to said plan, the IATSE withheld its skilled members from the Independents and required the Independents to pay discriminatory rates for labor; that the employers curtailed production of pictures, hoarded pictures, re-issued old pictures, and induced exhibitors to play the re-issues and to lengthen the playing time of all pictures; that by reason of such practices the Independents have curtailed their production of pictures. [R. 31-35, 73, 87.]

In this case, therefore, as in a previous companion case hereinafter discussed, injuries resulting from purported discharges and refusals to rehire are the gravamen of the action, and, in an effort to state an anti-trust claim, an attempt to injure the Independents and thus to restrain interstate commerce is alleged. It is significant, however, that:

(1) None of the Independents is a party to this action, either as plaintiff, defendant or intervenor.

(2) There is no allegation that petitioners suffered or are threatened with any injury because of the alleged acts done to eliminate the competition of the Independents, despite the fact that it is *only* those purported acts which could have affected prices or markets.

(3) The only damage which petitioners allege that they have suffered is damage caused by the enforcement of a purported closed shop agreement between the employers and the IATSE.

(4) There is no allegation that the individual petitioners ever sought to join or to secure permits from the IATSE in order to make themselves eligible for employment under the alleged closed shop agreement, or that the IATSE ever refused such membership or permits.

Indeed, the foregoing statement of the basic facts alleged by petitioners shows clearly that this case presents nothing more than an attempt by one labor organization, which was defeated in a jurisdictional struggle with its ancient rival, to utilize the federal courts to avenge itself upon the victorious rival union and upon the employers. Moreover, this attempt was made, as will be shown hereinafter, after their pretentious claims of conspiracy and unlawful acts had been rejected by the tribunal, namely, the National Labor Relations Board, which has exclusive jurisdiction to remedy the asserted injuries to petitioners.

**This Case Does Not Present Any Novel or Important Question of Federal Law.**

This Court has refused to grant certiorari in the following companion cases to the instant case: *Schatte v. IATSE*, 70 Fed. Supp. 1008, aff'd (9th Cir., 1948), 165 F. 2d 216, *cert. den.* 334 U. S. 812; *Schatte v. IATSE*, 84 Fed. Supp. 669, aff'd (9th Cir., 1950), 182 F. 2d 158, *cert. den.* 340 U. S. 827 (1950), reh. den. 340 U. S. 885; *Studio Carpenters Local Union No. 946 v. Loew's, Inc., et al.*, 84 Fed. Supp. 675, aff'd (9th Cir., 1950), 182 F. 2d 168, *cert. den.* 340 U. S. 828 (1950), reh. den. 340 U. S. 885; and *MacKay v. Loew's, Inc., et al.*, 84 Fed. Supp. 676, aff'd (9th Cir., 1950), 182 F. 2d 170, *cert. den.* 340 U. S. 828 (1950), reh. den. 340 U. S. 885. One of the foregoing cases, the second *Schatte* case, presented the same issue as the instant case.

The background of facts here is the same as in the previous companion cases—the Hollywood motion picture studios labor dispute of September, 1946. Originally the Studio Carpenters Union Local No. 946 was a party plaintiff in the instant case, but it withdrew by stipulation. [R. 95-97.] Thereafter the Studio Carpenters Union and some of its members filed the above named *Schatte, Studio Carpenters Union* and *MacKay* cases. Because motions to dismiss were granted earlier in these three cases than the motion for judgment on the pleadings in the instant case, it has taken longer for the Petition for Certiorari in this case to reach this Court.

In the second *Schatte* case there was alleged, among other things, a purported Sherman Act conspiracy and the same purported injury as is alleged in the case at bar. In denying relief in that case the Court of Appeals succinctly stated the applicable principle of law governing this

case, when it said: "The loss of their rights of employment is not a result of any lessening of commercial competition among the studios." In the instant case, the Court of Appeals noted that this "same observation holds true."[1] A contrary holding not only would have conflicted with decisions of this Court, but would have extended the anti-trust laws to cover almost the entire field of labor disputes. There is no more reason for this Court to disturb the conclusion of the Court below in this case than there was in the previous *Schatte* case.

**There Is No Conflict of Decision Between Courts of Appeals Which Would Warrant the Grant of Certiorari Here.**

Petitioners' contention that there is a conflict of decisions is without merit. To establish the asserted conflict, petitioners cite decisions which imply that a loss of employment can be an injury to business or property under the anti-trust laws (Pet. 13): *Roseland v. Phister*, 125 F. 2d 417; *Vines v. General Outdoor Advertising*, 171 F. 2d 487; *Gardella v. Chandler*, 172 F. 2d 402, and *Anderson v. Ship Owners*, 272 U. S. 359. These cases are relevant, if at all, to the ground for decision in the District Court [R. 143, 166], but they are not relevant to the basis of decision in the Court of Appeals. [R. 167, 170.] Likewise, the other cases cited by petitioners are in no way in conflict with the decision of the Court of Appeals in the case at bar.

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[1]Indeed, petitioners in the instant case, recognizing the controlling effect of the second *Schatte* decision upon the instant case, filed with this Court in that case a "Motion for Leave to File Briefs *Amicus Curiae* on Behalf of Petitioners." This motion was denied by this Court. (340 U. S. 827 (1950).)

Petitioners refer to no decision of a Court of Appeals, and we know of none, which conflicts with the Court of Appeals decision that a private litigant *not* claiming to have been injured by a restraint of commercial competition, *i. e.*, by price or market control, may not recover treble damages under the anti-trust laws.

**The Court Below Was Clearly Correct in Holding That a Claim Under the Sherman Act Is Not Stated Here Because the Alleged Damages Did Not Result From Any Act Prohibited by the Anti-Trust Laws.**

The Sherman Act (15 U. S. C. A. 15) gives a cause of action for treble damages to

> "any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws * * *."

Petitioners argue that because a conspiracy to restrain trade is forbidden by the anti-trust laws, it is sufficient therefore for them merely to show such an unlawful conspiracy and allege damages without showing any casual or other connection between the injury to them and a restraint of commercial competition. But injuries to private litigants cannot flow from a conspiracy: they must be the result of an act. Courts and commentators have consistently declared that to recover treble damages the plaintiff must show not only a violation of the anti-trust laws but damages which result from *acts* which constitute a violation of the anti-trust laws. In short, the injury must result from acts which tend to restrain commercial competition or to control prices. (*Schatte v. IATSE,*

182 F. 2d 158, 167, *cert. den.* 340 U. S. 827 (1950), reh. den. 340 U. S. 888; *Suckow Borax Mines Consolidated, Inc. v. Borax Consolidated Limited, et al.* (9th Cir., 1950), 185. F. 2d 196, 208; *Glenn Coal Co. v. Dickinson* (4th Cir., 1934), 72 F. 2d 885, 887; *Peterson v. Borden Co.* (7th Cir., 1931), 50 F. 2d 644, 645-646; *Jack v. Armour & Co.* (8th Cir., 1923), 291 Fed. 741, 745; Hadlick, Treble Damages Under the Anti-Trust Laws, at page 14.)

In view of these principles, it is important to ascertain whether the acts which are alleged to have damaged petitioners were acts which restrained trade or commerce.

Petitioners are suing for damages because individual petitioners allegedly were discharged and replaced by members of a rival union. [R. 30, 36-37, 73-74, 87-88.] Setting aside any question as to whether such action was legally justified or not, the fact remains that if any injury was suffered by petitioners it was suffered in the ordinary course of a jurisdictional labor dispute which is immune as such from the proscription of the anti-trust laws. (*Apex Hosiery Company v. Leader* (1940), 310 U. S. 469; *U. S. v. Hutcheson* (1941), 312 U. S. 219; *U. S. v. A. F. of Musicians* (D. C. Ill., 1942), 47 Fed. Supp. 304, aff'd (1943) 318 U. S. 741; *United Brick, Etc. Workers v. Junction City Clay Company* (6th Cir., 1946), 158 F. 2d 552.)

Even if we assume that the complaint states the elements of an unlawful conspiracy against the Independents, that conspiracy had nothing to do with petitioners who lost their jobs in the course of an ordinary jurisdictional labor dispute. Such loss involved no question of control of markets and prices. The Court of Appeals correctly said in its opinion that: "Not one of the acts alleged to

have caused injury to the appellants effectuated or tended to create a restraint on commercial competition in the motion picture industry." [R. 169.]

The treble-damage remedy provided by the anti-trust laws is a drastic one. For that reason courts have held that the scope of those laws must be limited to injuries received as a direct consequence of combinations to restrain free competition and to control markets and prices. (*Apex Hosiery Co. v. Leader, supra; United Brick & Clay Workers of America v. Junction City Clay Co., supra.*) Injuries which are received by reason of agreements between labor organizations and employers, such as closed-shop contracts or other restrictive arrangements, are not actionable under the Sherman Act, no matter why they were made (*Hunt v. Crumboch* (1945), 325 U. S. 821) unless they are designed to and do injure the plaintiff by reason of price or market control. (*Allen Bradley Co. v. Local Union No. 3,* 325 U. S. 797, 812 (1945).) The discharges of these petitioners, of course, had nothing to do with either of those elements, and the Court of Appeals correctly so held.

It is surprising that petitioners assert (Pet. 1-2) that their action is based upon "an Allen-Bradley type of conspiracy." To have an *Allen-Bradley* type case here the parties suing would have to be the Independents who, under the allegations, conceivably could have been injured through a lessening of commercial competition. The present petitioners are in a different position, for their purported damage, as the Court of Appeals pointed out, "does not flow from any injury to the competitive situation of the motion picture industry, that is, their injury has not arisen from the acts allegedly perpetrated against the Independents." [R. 168.]

Therefore this case bears no resemblance to the *Allen Bradley* case, where this Court found an "unholy alliance" between a group of employers and a group of unions for the purpose and with the effect of controlling markets and prices. It held that the plaintiff there, an independent manufacturer who was shut out from the market by such combination, could have redress by injunction against such unlawful control of markets and prices. But this Court made it clear in the *Allen Bradley* decision that the plaintiff could not have an injunction against acts done in the course of a labor dispute or against ordinary incidents of labor relations, such as agreements, including closed-shop agreements, between employers and unions. The acts and contracts of the union were held enjoinable only to the extent that they tended to control markets and prices to the injury of plaintiff by reason thereof. It will be recalled that in accordance with the directions of this Court, the District Court thereafter modified its judgment in the *Allen Bradley* case, and, upon the second appeal, the Court of Appeals ordered the judgment further modified to carry out the mandate of this Court by declaring that the injunction did not apply to acts of the union except those taken in combination with non-labor groups "to control prices and markets." (*Allen Bradley Co. v. Local Union No. 3* (2nd Cir., 1947), 164 F. 2d 71, 75, after decision in 325 U. S. 797 (1945).)

It follows that when a conspiracy contemplates acts which are in violation of the anti-trust laws (*i. e.*, restraint of interstate commerce) and also acts which are not so prohibited, a plaintiff can recover treble damages under the anti-trust laws only if he can show injury by reason of some act of defendant which tends to produce the prohibited restraint. There is no allegation of such

injury in the complaint here. The injury alleged results not from any act restraining competition of the Independents but simply and solely from the enforcement of a purported closed shop contract, imposing labor standards and having no effect whatsoever upon the Independents, prices, markets, or upon commercial competition.

Although petitioners contend they allege a single combination (Pet. 7), even under their own analysis it contained several phases and the combination alleged is divisible. (*Paramount Famous Lasky Corporation v. National Theatres Corporation* (4th Cir., 1931), 49 F. 2d 64, 66; *Oregon Steam Nav. Co. v. Winsor* (1873), 87 U. S. 64, 70-71.) Even if the Independents had been injured by the combination alleged, still this would not help petitioners, whose injury, if any, did not result from any restraint of or act tending to restrain commercial competition.

> "A plaintiff may not, therefore, assume the role of a *deus ex machina* for other parties and found a cause of action in its own favor on discrimination in violation of the Clayton Act as to such other parties." (*Carbonic Gas Co. v. Pure Carbonic Co.* (D. C. N. Y., 1933), 4 Fed. Supp. 992, 993.)

Petitioners have correctly noted (Pet. 13) that it is the *source* of the injury which is the test of a right to state a claim for treble damages under the Sherman Act. Since a conspiracy of itself does not give rise to a cause of action for treble damages, the private litigant must show an injury resulting from some act which is forbidden by the anti-trust laws. And the act, *i. e.*, the *source* of the injury, as the Court of Appeals here held, must be a restraint of prices or markets or acts tending to produce such a restraint. There was no such injury here.

**A Valid Alternative Ground for the Decision Below Is That It Would Invade the Exclusive Jurisdiction of the National Labor Relations Board for the Federal Courts to Provide a Remedy Here Either by Way of Damages or Injunction.**

An analysis of the allegations of the complaints in this case and of the applicable provisions of the National Labor Relations Act is presented in the Appendix to this brief. This analysis shows that each purported act which allegedly caused damage to petitioners was, if committed, an unfair labor practice. The exclusive power to remedy such acts has been committed by Congress to the National Labor Relations Board, which was created for the purpose of establishing a paramount, comprehensive, and exclusive scheme for the detection, prevention and correction of unfair labor practices affecting interstate commerce. (*Amalgamated Utility Workers v. Consolidated Edison Co.*, 309 U. S. 261, 264 (1940); *Phelps Dodge Corp. v. Labor Board*, 313 U. S. 177, 188, 194 (1941); *Schatte v. IATSE* (9th Cir., 1950), 182 F. 2d 158, 165-166, *cert. den.* 340 U. S. 827 (1950), reh. den. 340 U. S. 885; *United Electrical Radio & Machine Workers of America v. International Brotherhood of Electrical Workers, et al.* (2d Cir. 1940), 115 F. 2d 488, 490, 491.)

If unfair labor practices could be remedied by the courts through the granting of injunctions and damages in civil actions under the anti-trust laws, then the exclusive juris-

diction over unfair labor practices which Congress committed to the Labor Board,[2] and the entire purpose of Congress in having uniformity of regulation, policy and decision in labor matters would be defeated. Therefore we contend that the Sherman Act and the Labor Act must be construed together and the general statute (Sherman Act) must yield to the particular statute (Labor Act) which prescribes an exclusive remedy. Such a construction is consistent with the intent of Congress in the enactment of the National Labor Relations Act as is shown by the following excerpt from page 15 of Senate Report 573, 74th Congress:

> "Section 10(a) gives the National Labor Relations Board exclusive jurisdiction to prevent and redress unfair labor practices, and, taken in conjunction with section 14, establishes clearly that *this bill is paramount over other laws that might touch upon similar subject matter. Thus, it is intended to dispel the confusion resulting from dispersion of authority* and to establish a single paramount administrative or quasi judicial authority in connection with the development of the Federal American Law regarding collective bargaining."

Over the past five years, the Labor Board has made a number of decisions, both in unfair labor practice cases and in representation cases, affecting the motion picture

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[2]The elimination by the 1947 amendments to the National Labor Relations Act of the word "exclusive" from Section 10(a) of the Act, does not change the Board's exclusive jurisdiction in this respect. (*Schatte v. IATSE* (9th Cir., 1950), 182 F. 2d 158, 165-166; *Amazon Cotton Mills v. Textile Workers Union of America* (4th Cir., 1948), 167 F. 2d 183, 187; Conference Report, H. R. No. 510, p. 52, 80th Cong., 1st Sess.)

industry. [R. 116-140.][3] These decisions have had the salutary effect of eliminating industrial strife in the motion picture industry. In this connection, we respectfully submit that the "confusion resulting from dispersion of authority" which Congress intended to dispel by the enactment of the Labor Act, would instead be confounded if in the instant case a federal court had jurisdiction to grant relief, because any relief would necessarily nullify orders and directives of the National Labor Relations Board.

Congress could not have intended that the employers could be put in a situation where if they complied with orders of the Board they would be in contempt of court, and if they complied with a court's order they would

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[3]We believe that these matters constitute public and private official acts of an executive agency of the United States which may be judicially noticed. (Cal. Code of Civil Procedure, Sec. 1875; *Pittsburgh Plate Glass Co. v. N. L. R. B.* (1941), 313 U. S. 146, 157; *Caha v. U. S.* (1894), 152 U. S. 211, 221.) In any event it is apparent that to grant relief in a Sherman Act proceeding might well run counter to the decisions and directions of the National Labor Relations Board and could well put the employers in a position where they would be ground between a judgment of a Court and a conflicting order of the Labor Board. Such conflicts would be inevitable if two tribunals asserted jurisdiction to remedy the same purported wrong. Certainly the comprehensive plan of the National Labor Relations Act for eliminating restraints upon interstate commerce could be impaired and even nullified if the courts under the Sherman Act could issue restraining orders which the Labor Board had refused to issue, or require payments of damages or back pay in situations where the Labor Board had determined damages or back pay should not be ordered, or could compel an employer to recognize or deal with a particular union when the Labor Board had ordered the employer to recognize and deal with a different union.

violate orders and directives of the Board. Yet this would be the necessary effect of any judgment granting relief to petitioners in the case at bar. There would be a serious interference with the exclusive jurisdiction of the Board and with Board decisions if petitioners were able to circumvent the Labor Board and induce the federal courts to take action directly contrary to that already taken by the Board.

In an analogous situation with regard to the Shipping Act in the *Cunard* case (*United States Navigation Co. v. Cunard Steamship Co.*, 50 F. 2d 83, affirmed 284 U. S. 474 (1932)), Circuit Judge Augustus Hand well stated the reason why anti-trust remedies were not available. In the following quotation from the opinion in that case, we have substituted the word "labor" where Judge Hand used the word "shipping" (p. 90):

> "No doubt, if the allegations in the amended bill are found to be correct, the Anti-Trust Acts have been violated, but the [Labor] Act has been violated as well. Though the remedies under the Anti-Trust Acts are thought by plaintiff's counsel to apply, it does not follow that they do, where the frame of the [Labor] Act indicates another procedure. We find that all the wrongs alleged are violations of the [Labor] Act and hold that the plaintiff must seek its remedy thereunder.
>
> * * * * * * * * *
>
> "* * * We think that every reason of policy and convenience should prompt the courts to 'take arms'

against a sea of trouble by requiring resort to the [Labor] Board in situations like the present. That tribunal has exclusive jurisdiction here because of the nature of the questions involved and the broad powers given to it under the act.

* * * * * * * *

"It seems clear that any disposition of this suit other than that by the court below would not only add enormously to judicial labors, but would hopelessly complicate the situation we have before us by applying two separate and in some respects inconsistent remedies to transactions already difficult enough in themselves. We hold that the analogy of the decisions under the Interstate Commerce Act is complete, and that the broad powers given by the [Labor] Act furnish added reason for denying injunctive relief."

The enactment of the Labor Act necessarily limited the scope of existing federal statutes, such as the Sherman Act, just as the passage of the Norris-La Guardia Act limited the scope of the Sherman Act by removing certain types of activities from its prohibitions (*United States v. Hutcheson* (312 U. S. 219 (1941).) Congress has committed exclusive jurisdiction over the conduct which allegedly caused injury to petitioners to the Labor Board and petitioners may pursue their remedies before the Board and in no other forum.

**The Decision of the Court of Appeals Is Also Supportable on the Ground That Petitioners Were Not Injured in Their Business or Property Within the Meaning of the Sherman Act.**

We have heretofore noted that the complaint alleges that the IATSE and the employers agreed to discharge the CSU members and not to reemploy them unless they became members of or obtained a work permit from the IATSE [R. 29-30, 73, 87-88]. There is no allegation that the individual petitioners ever sought to join or secure permits from the IATSE in order to make themselves eligible for employment under the alleged closed shop contract or that the IATSE ever refused such membership or permits. In essence, the individual petitioners claim damages because they were refused a right to work under the jurisdiction of one union (CSU) rather than another (IATSE).

The employment of the individual petitioners was solely one at the will either of the employer or the employee. Such employment is not a business nor is it a property right a loss of which can give rise to a claim for treble damages under the anti-trust laws. (*Gerli v. Silk Ass'n of America* (S. D. N. Y. 1929), 36 F. 2d 959, 960-961; *Corey v. Boston Ice Co.* (D. C. Mass. 1913), 207 Fed. 465, 466.) While employment might be said to be business or it might be said to be property for some purpose not here material, it is not the kind of business or property contemplated by Congress in the Sherman Act. "* * * Congress did not intend in the anti-trust acts to cover restraints upon employment." (See *Gardella v. Chandler* (2d Cir., 1949), 172 F. 2d 402, 406.)

The union petitioners claim damages resulting from loss of revenue, resulting from withdrawal of member unions,

expenditures for the purpose of endeavoring to negotiate agreements, and in endeavoring to reach agreements with defendant companies for the rehiring of CSU members. [R. 36-37.] In essence, the union petitioners claim damage because their rival in a jurisdictional struggle between unions was successful. Such damages are not compensable under the anti-trust laws. (*United States v. Hutcheson* (1941), 312 U. S. 219-232; *United States v. Carrozzo* (N. D. Ill. 1941), 37 Fed. Supp. 191, aff'd (1941), 313 U. S. 539; *Terrio v. S. N. Nielsen Construction Co.* (E. D. La. 1939), 30 Fed. Supp. 77.)

The business or property an injury to which gives rise to an action for treble damages under the Sherman Act is business or property which can be directly injured by monopoly prices or control of markets and there is no way except indirectly that union membership or employment can be so injured.

## Conclusion.

There is no conflict between decisions of Courts of Appeals. This case does not present any novel or important question of federal law and the question that it does present has been correctly decided. In a companion case presenting the same issue this Court has refused to grant *certiorari*. The Petition for Certiorari here should also be denied.

Respectfully submitted.

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## APPENDIX.

### Analysis of the Allegations of the Complaint and of the Complaints in Intervention and Comparison of Those Allegations With the Provisions of the Labor Act.*

| Allegations of the Complaint and Complaints in Intervention. | Section of National Labor Relations Act, Which Alleged Conduct Would Violate. |
|---|---|
| COMPLAINT: | |
| 1. Employer defendants, for the purpose of destroying the CSU and its member unions, conspired to cease employing members of said unions unless they gave up their membership in said unions or obtained a work permit card from a local of the IATSE, and to employ thereafter only members of permittees of locals of the IATSE. Pursuant to said conspiracy, said defendants discharged | 1. This is a charge that defendants violated Section 8(1) and (3) of the National Labor Relations Act. Section 8(3) prohibits discrimination in employment on account of union membership. Section 8(1) prohibits interference with employees in the exercise of their right of self-organization. |

*The purported acts which caused damage to petitioners occurred in 1946, prior to the enactment of the Labor-Management Relations Act of 1947, and are, therefore, discussed in relation to the National Labor Relations Act which became effective on July 5, 1935. However, such acts would, if committed subsequent to August 22, 1947, have been unfair labor practices under the Labor-Management Relations Act. (29 U. S. C. A., Pocket Part, Sec. 158.)

| Allegations of the Complaint and Complaints in Intervention. | Section of National Labor Relations Act, Which Alleged Conduct Would Violate. |
|---|---|
| from their employ persons belonging to Moving Picture Painters' Local 644 and Carpenters' Local 946. [Complaint, Paragraphs XII(e) and (f), XIII(e), and XV(a); (R. 29-30, 32, 36).] | |
| 2. That the employer defendants refused to employ members of Local 1488 of the Painters' Union, Local 278 of the Janitors' Union, and Local 40 of the Electricians' Union, unless said locals withdrew from the CSU, and refused to negotiate with Local 1488 of the Painters' Union unless said local withdrew from the CSU. [Complaint, Paragraphs XIII(f), (g) and (h); (R. 32-33).] | 2. This is a charge that said defendants violated Section 8(1), (3) and (5) of the Labor Act.<br>Section 8(3) prohibits discrimination in employment on account of union membership; Section 8(1) prohibits interference with an employee's right of self-organization, and Section 8(5) prohibits refusal to bargain with the collective bargaining representative of said employee. |

The above acts are the only acts which are alleged to have caused damage to the plaintiffs. [Complaint, Paragraph XV (R. 36, 37).]

| Allegations of the Complaint and Complaints in Intervention. | Section of National Labor Relations Act, Which Alleged Conduct Would Violate. |
|---|---|
| COMPLAINTS IN INTERVENTION.<br><br>The complaints in intervention allege that interveners were members of one of the following constituent local unions of the CSU: Moving Picture Painters' Locals 644 and 1421, Machinists' Local 1185, and Molders' Local 374. These complaints adopt the allegation of plaintiffs' amended complaint and allege that pursuant to the conspiracy described therein defendant motion picture companies either discharged or refused employment to interveners and that because of such discharge or refusal of employment interveners suffered damage. [Adkins Complaint, Paragraphs III, IV, V, VI (R. 72-74). Adams Complaint, Paragraphs II, III and V [R. 87 89).] | This is a charge that said defendants violated Sections 8(1) and (3) of the National Labor Relations Act. |

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1951.
No. 475

CONFERENCE OF STUDIO UNIONS, an unincorporated association, *et al.*,

*Petitioners,*

*vs.*

LOEW'S INCORPORATED, a corporation, *et al.*,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

**Brief for Respondents International Alliance, Etc., Walsh, Brewer, Duval, Fairbanks, Smith, Aller, Dennison, and Local 44 of the International Alliance, etc. in Opposition.**


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No. 475

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*Petitioners,*

*vs.*

LOEW'S INCORPORATED, a corporation, *et al.*,

*Respondents.*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.**

## Brief for Respondents International Alliance, etc., et al., in Opposition.

### Opinion Below.

The Opinion of the United States Court of Appeals for the Ninth Circuit [R. 162-170] has not, at this writing, been officially reported.

### Jurisdiction.

The jurisdictional requisites are adequately set forth in the Petition.

## Question Presented.

Is a claim—upon which relief may be granted against a labor union, by way of injunction and treble damages under the Anti-Trust Laws—stated in a complaint in which labor unions and members thereof are plaintiffs, and a rival union and a group of employers in the motion picture industry are defendants, where the basic allegations are that:

Defendant union and defendant employers entered into a conspiracy (1) "for the purpose of destroying" plaintiff unions (to be accomplished by said employers (a) discharging and refusing to reemploy such unions' members unless they gave up their membership therein, and (b) employing only members of the defendant rival union or persons who procured its written consent), and (2) "for the *further purpose* of eliminating" competitors of the employers, none of such competitors being a party to the action (to be accomplished (1) by the employers hoarding pictures, curtailing distribution, inducing longer exhibition of pictures, etc., and (2) by the defendant union furnishing its more skilled members to such employer defendants and requiring the competitors to pay some workmen higher wages than employer defendants paid for the same type of work;

None of the acts which plaintiffs claim injured them did, or tended to, restrain trade; and

The only acts effectuating the alleged conspiracy which did, or tended to, restrain trade were directed solely against the competitors of defendant employers, none of such acts causing injury to plaintiffs?

## Statute Involved.

The pertinent provisions of the Anti-Trust Laws, Section 1 and Section 15 of Title 15, U. S. C. A., involved are set forth in the Petition at pages 19-21.

## Statement.

This litigation stems from the same jurisdictional dispute between several labor unions which gave rise to: *Oscar Schatte, et al., v. International Alliance, etc., et al.,* 70 Fed. Supp. 1008, 165 F. 2d 216, cert. den. 334 U. S. 812, 92 L. Ed. 1743; *Oscar Schatte, et al. v. International Alliance, etc., et al.,* 182 F. 2d 158, cert. den. 340 U. S. 827, 95 L. Ed. 608, rehearing denied 340 U. S. 885, 95 L. Ed. 643 (hereinafter referred to as the *Second Schatte* case); *Studio Carpenters Local Union No. 946, etc. v. Loew's Incorporated, et al.,* 182 F. 2d 168, cert. den. 340 U. S. 828, 95 L. Ed. 608, rehearing denied, 340 U. S. 885, 95 L. Ed. 643; *Andrew MacKay v. The Loew's Inc., et al.* (and consolidated cases), 182 F. 2d 170, cert. den. 340 U. S. 828, 95 L. Ed. 608, rehearing denied, 340 U. S. 885, 95 L. Ed. 643, and *National Labor Relations Board v. Warner Bros. Pictures, Inc., et al.,* 191 F. 2d 217.

Petitioners, plaintiffs below, are a group of labor organizations who are, with one exception, affiliated with the American Federation of Labor; they are associated under the name Conference of Studio Unions and their members are employed in the Hollywood motion picture industry in various work classifications such as painters, plumbers, machinists, etc. Such Petitioners, as were Intervenors below, are individual members of the labor organizations constituting the Conference of Studio Unions.

Hereinafter all petitioners will sometimes be referred to as The Conference.

Respondents consist of two groups: (1) the International Alliance of Theatrical Stage Employes and Moving Picture Machine Operators of the United States and Canada, an international labor organization likewise affiliated with the American Federation of Labor, certain of its officers and one of its chartered locals, all of which will hereinafter be referred to as The IATSE, and (2) a group of employers who produce and distribute motion pictures, hereinafter referred to as The Majors.

The Majors produce practically all of the motion pictures in Hollywood; a small number of pictures are produced by a group of companies known as The Independents, none of which is a party to this action. The entire number of pictures produced annually by The Independents does not exceed 15% of the total number of motion pictures produced in Hollywood; motion pictures produced by them are far less expensive than those produced by The Majors; the average production cost of a feature picture produced by The Independents is not more than 20% of the average production cost of a picture produced by The Majors; among The Independents are corporations which are organized for the purpose of producing a single picture or several of a series and which, when the picture or the series has been completed, are dissolved or go out of business; the total number of persons employed by The Independents is less than 20% of the number employed by The Majors; the single-picture-corporation customarily employs a crew sufficient only to man a single picture for the period of production; the bargaining power of The Independents with the labor unions is smaller than that of The Majors [R. 27-28].

From the complaint it appears:

(a) "The defendants [respondents herein] combined and agreed each with the other for the purpose of destroying the Conference and the Member Unions, and for the further purpose of eliminating as competitors the motion picture companies herein described as Independents" and pursuant to such combination and agreement certain acts, directed against the Independents solely, and not against plaintiffs, and certain other acts directed against plaintiffs, solely and not against the Independents, followed. The acts directed against the Independents are set forth in Paragraphs (a), (b), (c), (d), (i), (j) and (k) of Paragraph XIII of the complaint [R. 31, 32, 33, 34] and are adequately described in the petition herein.

(b) That by these particular acts "the interstate commerce carried on between Majors and Independents in the production and distribution of motion pctures had been restrained and burdened" [R. 35].

*(It is not alleged, and no claim is made, that any of such acts or the asserted result thereof in any manner caused injury to plaintiffs.)*

(c) With respect to the alleged effectuating acts directed against petitioners, that The Majors discharged persons in their employ who were members of certain of The Conference unions [R. 32]; that The Majors refused to negotiate labor agreements, or to accept for work any persons belonging to certain of The Conference unions until such unions withdrew from The Conference, and upon such withdrawal, such members were permitted to return to work [R. 32-33].

*(These are the only acts directed against petitioners performed pursuant to the alleged conspiracy. No claim is made that these acts, or the results thereof, did, or tended to, restrain trade.)*

(d) "As a *further* direct result of said agreement and combination, the plaintiffs were injured in their respective businesses and property" [R. 36] in the following fashion:

(1) Plaintiff Kisner was discharged as a result of which he lost a specified sum in *wages.*

(2) By reason of the withdrawal of certain labor unions from The Conference, its monthly revenue was diminished.

(3) The Conference expended substantial sums of money "for the purpose of endeavoring to negotiate agreements" between The Majors and member unions of The Conference, and "for the purpose of endeavoring to reach agreement with defendant Majors for the rehiring of members of member unions and in maintaining its membership" [R. 36-37].

(4) Intervenors have sustained "loss of wages" [R. 74-89].

As a result of the foregoing it is alleged The Conference unions will be destroyed because their members will be compelled to withdraw from membership therein which in turn will destroy The Conference, because the unions' members thereof will be compelled to withdraw therefrom and finally the individual members of The Conference unions will forever lose "their opportunity for re-employment in the motion picture industry, etc." [R. 37-38].

## ARGUMENT.

### I.

### A Conspiracy Forbidden by Section 1, Title 15, U. S. C. A., Cannot of Itself Be the Basis for a Civil Action for Damages; Injury to Be Compensable Under the Anti-trust Laws Must Be the Direct and Proximate Result of an Overt Act Which Does or Tends to Restrain Trade.

Petitioners' conclusion that they are entitled to relief by way of an injunction and three-fold damages, is based on the erroneous premise, urged by them in both courts below and asserted in their petition herein, that since a forbidden conspiracy is alleged, they have been injured by something "forbidden in the Anti-Trust Laws," and therefore come within the provisions of Section 15, Title 15, U. S. C. A. This is not the law and petitioners have fallen into error by failing to recognize that a conspiracy of itself can injure no one and in order for a forbidden conspiracy to ripen into a civil cause of action in which damages are sought, there must be an overt act effectuating the conspiracy, which overt act must not only be the direct and proximate cause of the injury complained of, but, in addition, must be of such a nature that it does or tends to restrain trade.

Nearly forty years ago this Court said in *Nalle v. Oyster*, 230 U. S. 165, at pp. 182-183, 57 L. Ed. 1439 at p. 1446:

> "But the well settled rule is that no civil action lies for a conspiracy unless there be an overt act that results in damage to the plaintiff. To this effect are the very authorities upon which plaintiff in error relies."

Not only must there be "an overt act that results in damage to the plaintiff," but such damage must be the direct, proximate and immediate result of such act and the act must be of such nature as does or tends to restrain trade. On the first occasion after the enactment of the Anti-Trust Law in 1890, upon which this Court had occasion to advert to this principle of law, it said in 1898, in *Hopkins et al. v. U. S.*, 171 U. S. 578 at pp. 592, 593; 43 L. Ed. 290 at p. 296:

> "The contract condemned by the statute is one whose direct and immediate effect is a restraint upon that kind of trade or commerce which is interstate.
>
> * * * * * * * *
>
> * * * there must be some direct and immediate effect upon interstate commerce in order to come within the act.
>
> (171 U. S. 592.)
>
> * * * * * * * *
>
> * * * the effect upon commerce spoken of must be direct and proximate." (171 U. S. 594.)

The rule of law enunciated in the *Hopkins* and *Nalle* cases has been followed without deviation by the Court of Appeals of each circuit and by all District Courts which have had occasion to refer to the subject. As typical of such decisions by various Courts of Appeal we direct attention to the following:

*Jack v. Armour & Co.* (8 Cir.), 291 Fed. 741 at p. 745; *Foster & Kleiser v. Special Site Sign Co.* (9 Cir.) 85

F. 2d 742 (cert. den. 299 U. S. 613, 81 L. Ed. 452); *Peterson v. Borden Co.* (7 Cir.), 50 F. 2d 644 at p. 645, 646; *Glenn Coal Co. v. Dickinson Fuel Co.* (4 Cir.), 72 F. 2d 885 at 887; *Noyes v. Parsons, et al.* (9 Cir.), 245 Fed. 689 at 694; *Konecky v. Jewish Press* (8 Cir.), 288 Fed. 179 at 181; *Hart v. B. F. Keith Vaudeville Exchange, et al.* (2 Cir.), 12 F. 2d 341 at 345; *Locker v. American Tobacco Co.* (2 Cir.), 218 Fed. 447 at 448; *Phillips v. Iola Portland Cement Co.* (8 Cir.), 125 Fed. 593 at 594; *Rice v. Standard Oil Co.* (Cir. Ct. D. New Jersey), 134 Fed. 464 at 465; *Suckow Borax Consol. v. Borax Consolidated* (9 Cir.), 185 F. 2d 196 at 208; *Shotkin v. General Electric Co.* (10 Cir.), 171 F. 2d 236; *Feddersen Motors v. Ward* (10 Cir.), 180 F. 2d 519; *Burnham Chemical Co. v. Borax Consolidated* (9 Cir.), 170 F. 2d 569 at 571; *Morris & Co. v. Nat'l Ass'n of Stationers* (7 Cir.), 40 F. 2d 620, and *Schatte, et al. v. International Alliance etc., et al.* (9 Cir.), 182 F. 2d 158, cert. den. 340 U. S. 827, 95 L. Ed. 608; re-hearing denied 340 U. S. 885, 95 L. Ed. 643.

These cases—many of them citing both the *Hopkins* and *Nalle* cases,—hold: (a) that, on both reason and authority, no one can maintain an action under the Anti-Trust Laws, unless he has suffered an injury in his business or property by proximate reason of the violation by those whom he sues, of some of the prohibitions contained in the act; (b) to justify recovery there must be allegations and proof of a causal connection between the damage and the overt acts effectuating the forbidden conspiracy;

(c) the gist of the action is not merely the unlawful conspiracy, but is damage to the individual plaintiff resulting proximately from the acts of the defendant which constitute a violation of the law; (d) if a person has been injured by acts which are not forbidden or declared to be unlawful by the Anti-Trust Laws, he can not recover; (e) the conspiracy condemned is one the direct intent and effect of which is a restraint upon interstate commerce and not one where the effect is merely incidental; (f) the wrongful act must be specific and the natural and probable effect of the combination, which, in turn, must be in restraint of trade. Mere proof that a defendant has entered into a contract, combination or conspiracy in restraint of trade, is not sufficient to support a civil cause of action. Where a private suitor asserts a claim under the act, the gravaman of the complaint is not the forbidden conspiracy, but the damage, for which a recovery is allowable, is the damage which he has suffered as a result of the acts of the conspirators directed against him and committed in the course of the forbidden conspiracy, and in furtherance of its purpose; (g) the injury must be the result of acts which do or tend to lessen commercial competition; and (h) the right of action given to persons injured through the resultant tendency to substantial lessening of competition includes only such injury as such tendency to lessen competition engenders.

## II.

## There Is No Conflict of Decision.

Although petitioners state as one of the two grounds upon which they rely for the allowance of the writ is that the decision of the Court of Appeals is in conflict with the decisions of other Courts of Appeals on the same matter (Pet. 6), they do not cite any conflicting decision or argue the point. There is no conflict between the decision of the Court of Appeals below and any decision of any other United States court. Petitioners cite *Roseland v. Pfister,* 125 F. 2d 417; *Vines v. General Outdoor Advertising,* 171 F. 2d 487; *Cardella v. Chandler,* 172 F. 2d 402, and *Anderson v. Shipowners,* 272 U. S. 359. These are not conflicting decisions. In each of these cases there was not only a forbidden contract, combination or conspiracy to restrain trade or to create a monopoly, but the injuries to the respective plaintiffs were the direct and proximate result of overt acts which of themselves did, or tended to, restrain trade or create a monopoly. In the instant case there is no contention by petitioners that any act causing them injury did or could restrain trade; in fact the contrary is conceded.

## III.

## There Is No Important Question of Federal Law Involved; the Court of Appeals Followed Long Settled Applicable Rules of Law.

As we have heretofore pointed out, it has for many years been the well settled rule of law, enunciated initially by this Court in the *Hopkins* and *Nalle* cases, *supra,* and followed without deviation whenever the question was presented, by all Courts of Appeal and District Courts, that in a civil action between private parties under the

Anti-Trust Laws a forbidden conspiracy of itself gives rise to no injury, and, in order for compensable damage to exist, there must be injury resulting directly and proximately, not indirectly nor remotely, from the overt acts effectuating such conspiracy, and such acts must be of a nature which do or tend to restrain trade. The Court of Appeals below very properly determined that, since the injury to petitioners did not stem from any lessening of commercial competition among the studios, but from acts which could have had no effect upon interstate commerce, the District Court correctly held that the complaint did not state a claim upon which relief could be granted under the Anti-Trust Laws.

## IV.

## The Decision Below Is Clearly Correct.

In *The Second Schatte Case* (182 F. 2d 158, cert. den. 340 U. S. 827, 95 L. Ed. 608, rehearing denied 340 U. S. 885, 95 L. Ed. 643), plaintiffs in the District Court, who ultimately became petitioners for a writ of certiorari in this Court, were individual members of Studio Carpenters Local Union No. 946, which was initially a party plaintiff in this action [R. 3], but which withdrew before the judgment of dismissal was entered herein [R. 95-96-97]. They instituted their separate action for and on behalf of themselves and all other members of said Local No. 946. Defendants in that action were The Majors and The IATSE, respondents herein.

In their third cause of action, they alleged, as do petitioners herein, that a conspiracy was entered into—being the same conspiracy as is asserted by petitioners herein—

to eliminate The Independents as competitors of The Majors, to deprive the individual carpenters, members of said Local 946, of their employment, and to give such employment to members or permittees of respondent The IATSE. They sought relief by way of threefold damages and an accounting under the Anti-Trust Laws. Judgment of dismissal was entered by the District Court which was affirmed by the United States Court of Appeals for the Ninth Circuit, it holding that the alleged acts did not constitute a violation of the Anti-Trust Laws and that the loss of plaintiffs' rights of employment was not the result of any lessening of commercial competition among the studios (182 F. 2d 158 at 167). Plaintiffs in that action, who were appellants before the Court of Appeals, unsuccessfully sought to obtain a writ of certiorari from this Court. Petitioners in the instant case filed with this Court a motion for leave to file a brief as *amici curiae,* which motion was by this Court denied (340 U. S. 827, 95 L. Ed. 608). Therefore, since the primary question concerned in the third cause of action in the second *Schatte* case, and the primary question presented by the petition for writ of certiorari in the instant case, are substantially the same, it would appear that this Court has but recently denied a petition for a writ of certiorari involving the same question as is now presented, and after it had the benefit of a supporting brief filed by petitioners herein.

When the instant case reached the Court of Appeals, petitioners herein—appellants below—vigorously attacked the decision of that Court in *The Second Schatte Case*

and endeavored to persuade the Court of Appeals either to abandon the position which it had taken in *The Second Schatte Case,* or to so interpret its own language as to render it not controlling in the instant case. The Court of Appeals reaffirmed the position which it had taken in *The Second Schatte Case,* stating as follows:

> "We held in that case [*Second Schatte Case*] that no violation of the anti-trust laws had been shown because no restraint on 'commercial competition' had been alleged, no more being alleged than an agreement to compel the Independents to adopt certain employment policies. In the complaint in the instant case an attempt is made to allege a restraint on commercial competition by showing wage rate discrimination against the Independents and the agreement entered into among the Majors to restrict production. In reference to the complaint in the Schatte case we said that in the event the alleged conspiracy be considered illegal no recovery could be had because there was no allegation of '* * * damage which stems from a conspiracy in violation of the anti-trust laws * * *. The loss of their rights of employment is not a result of any lessening of commercial competition among the studios.' 182 F. 2d 158, 167. We think the same observation holds true with respect to the allegations of the complaint in the instant case." [R. 167.]

The Court of Appeals below then went on to say that the alleged conspiracy in the instant case was not such as would bring the petitioners herein within the contemplation of the Anti-Trust Law and that the entire import

of the alleged conspiracy, in so far as competitive conditions are concerned, was the attempt to destroy The Independents. As the Court stated:

> ". . . Any restraint on commercial competition would occur in the production of motion pictures and we fail to see how the appellants are in a position to complain about that situation. They are not in the business of producing motion pictures; they do not exhibit motion pictures; they neither compete with the Majors nor purchase from them. In fact, they are not employees of the companies whom it is alleged the appellees intend to destroy. The damage alleged to have been suffered by appellants does not flow from any injury to the competitive situation of the motion picture industry, that is, their injury has not arisen from the acts allegedly perpetrated against the Independents." [R. 167-168.]

The Court of Appeals then applied the long settled rule, hereinbefore discussed, to the effect that injuries, in order to afford relief under the Anti-Trust Laws in a civil action between private suitors, must be the direct and proximate result of acts which effectuated or tended to create a restraint on commercial competition and that injuries which are merely incidental do not form the basis for such relief. This was the crux of the Court's decision and, in the final analysis, is the only question now presented to this Court by the petition herein.

However, other grounds in support of the District Court's judgment of dismissal were presented to both courts below by respondents. The Court of Appeals noted such contentions [R. 166] but did not find it necessary, in order to sustain the judgment appealed from, to discuss or pass upon any of them. The additional contentions of

respondents, any one of which we submit, necessitates an affirmance of the judgment of dismissal, are summarized as follows:

(1) Even if it be assumed *arguendo* that the complaint adequately alleges a claim which would sustain a judgment for treble damages in favor of petitioners under Section 15, Title 15, U. S. C. A., or for an injunction under Section 26, prior to the enactment of the National Labor Relations Act, the District Court, nevertheless, did not have jurisdiction, and said complaint did not state a claim upon which relief could be granted for the reason that the only acts resulting in injury to petitioners constituted unfair labor practices over which the National Labor Relations Board has exclusive jurisdiction. Doctrine of primary jurisdiction applies. (Sec. 160(a), Title 29, U. S. C. A.; Sec. 158, Title 29, U. S. C. A.; *Schatte, et al. v. International Alliance, etc., et al.* (9 Cir.), 182 F. 2d 158; cert den. 340 U. S. 827, 95 L. Ed. 608, rehearing denied 340 U. S. 885, 95 L. Ed. 643; *Amalgamated Utility Workers v. Consolidated Edison Co.*, 309 U. S. 261; *United Electrical Radio & Machine Workers v. International Brotherhood of Electrical Workers*, 115 F. 2d 488; *California Association of Employers v. Building and Construction Trades Council* (9 Cir., 1949), 178 F. 2d 157; *Amazon Cotton Mill Co. v. Textile Workers Union* (4 Cir., 1948), 167 F. 2d 183; *Keogh v. Chicago and Northwestern R. Co.*, 260 U. S. 156; *U. S. Navigation Co. v. Cunard SS. Co.*, 284 U. S. 474; *Terminal Warehouse Co. v. Pennsylvania R. R. Co.*, 297 U. S. 500; *Georgia v. Pennsylvania R. R. Co.*, 324

U. S. 439; *S. S. W. Inc. v. Air Transport of America, et al.,* 91 Fed. Supp. 269; 51 Harvard Law Review, 1251 and 1255.)

(2) Doctrine of primary jurisdiction is still applicable and not affected by fact that not all employees work for same employer (*N. L. R. B. v. Grower-Shipper Vegetable Association* (9 Cir.), 122 F. 2d 368; *N. L. R. B. v. Long Lake Lumber Co.* (9 Cir.), 138 F. 2d 363; *N. L. R. B. v. Sun Tent Co.* (9 Cir.), 171 F. 2d 483; *Phelps-Dodge Corp. v. Labor Board,* 313 U. S. 177 at 188 and 194.)

(3) The alleged conspiracy which assertedly resulted in injury to petitioners is not forbidden in the Anti-Trust Laws. It is nothing more than a closed-shop agreement, valid under the National Labor Relations Act and under the laws of the State of California. (*Colgate Palmolive-Peet Co. v. N. L. R. B.,* 338 U. S. 355, 94 L. Ed. 161.) Even the synchronization of a closed-shop contract and an arbitrarily closed union does not give one, who, by reason thereof, is deprived of his livelihood, a cause of action under the Anti-Trust Laws. (*Courant v. International Photographers, etc.* (9 Cir.), 176 F. 2d 1000-1002, cert. den., 338 U. S. 943, 94 L. Ed. 581.) Carpenter-painter-machinist, etc., work in the motion picture studios is neither intrastate nor interstate trade or commerce; it is not a commercial activity; it is labor. (*United States v. Fur Dressers, etc.*, 5 F. 2d 869 at 872.) Whether one or another group of men does such work in the studios constitutes a mere private controversy, local in character. (*Hopkins v. U. S.,* 171 U. S. 578, 43 L. Ed. 290.)

(4) Competition between labor organizations which results in the members of one of them obtaining the work formerly performed by the members of the other or which results in the elimination or destruction of one of the competing labor organizations does not give rise to any cause of action under the Anti-Trust Laws. (*United States v. Hutcheson*, 312 U. S. 219, 85 L. Ed. 788; *United States v. Carrozzo*, 37 Fed. Supp.. 191, affd. 313 U. S. 539, 85 L. Ed. 1508; *Terrio v. S. N. Nielson Const. Co.*, 30 Fed. Supp. 77.)

(5) The alleged conspiracy is divisible and severable as to that which is forbidden and that which is not forbidden in the Anti-Trust Laws. (*Daniels v. Tearney*, 102 U. S. 415 at 420, 26 L. Ed. 187 at 188; *McCullough v. Commonwealth of Virginia*, 172 U. S. 102 at 115-116, 43 L. Ed. 382 at 387; *Shotkin v. General Electric Co.*, 171 F. 2d 236 at 238; *Oregon Steam Nav. Co. v. Winsor*, 87 U. S. 64 at 70-71, 22 L. Ed. 315 at 319, 20 Wall. 64 at 70-71; *Western Union Telegraph Co. v. B. & S. Ry. Co.*, 11 Fed. 1, 4, 5; *United States Consol. S. R. Co. v. Griffin & Skelley Co.*, 126 Fed. 364 at 370; *Chicago, St. L. & N. O. R. Co. v. Pullman Southern Car Co.*, 139 U. S. 79 at 91, 35 L. Ed. 97 at 102; *Paramount, etc. v. National Theatre Corporation*, 49 F. 2d 64 at 66; *United States v. Bradley*, 10 Pet. (U. S.) 343, 35 U. S. 448; *Paramount Famous Lasky Corporation v. National Theatre Corporation* (4 Cir.), 49 F. 2d 64; *McJunkin v. Richfield Oil Corporation*, 33 Fed. Supp. 466, 468-469; *Noyes v. Parsons, et al.*, 245 Fed. 689 at 694.)

## Conclusion.

Having been defeated by respondent The IATSE in the open market of labor competition. The Conference, as a last resort, now seeks to impose upon The IATSE, its competitor in such labor market, the punitive measures provided for in the Anti-Trust Laws. They say (Pet. p. 13), "that the anti-trust decisions have used language indicating that it is the *source* of the injury, and not the character of the property injured, which constitutes the test of recovery." With this statement we are in accord; however, the *source* of the injuries which petitioners say they suffered were acts which did not, and could not in any fashion, restrain trade. Since the only acts which at best could tend to restrain trade were directed against The Independents and caused petitioners no injury, petitioners may not, therefore, assume the role of a *deus ex machina* for The Independents and found a cause of action in their own favor on an alleged violation of the Anti-Trust Laws directed against The Independents.

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

January 10, 1952.

Respectfully submitted,

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